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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

MISSION OAKS MOBILE HOME PARK,
a California General Partnership,
Petitioner,
vs.
CITY OF HOLLISTER, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit was correct in affirming the dismissal of a federal suit on *Younger* abstention grounds where the park owner had filed challenges to a mobilehome park space rent control ordinance in state court alleging the same violations prior to filing the federal suit?

2. Whether the Ninth Circuit was correct in concluding that a purported reservation of federal claims filed in the state court over a year after the state action was commenced was inapplicable to prevent abstention on *Younger* grounds?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Mission Oaks Mobile Home Park, a California general partnership and Respondents City of Hollister, Hollister City Council and Hollister Mobilehome Rent Commission.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, City of Hollister, et al. ("City") respectfully request that this Court deny Mission Oaks Mobile Home Park's ("Mission Oaks") Petition for Writ of Certiorari ("Petition") seeking review of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") opinion in this case.

OPINION BELOW

On March 30, 1992, the United States District Court for the Northern District of California issued its Order granting City's Motion to Dismiss and dismissing Mission Oaks' action. See, *Mission Oaks Mobile Home Park v. City of Hollister,* 788 F.Supp. 1117 (N.D. Cal. 1992); see also, Order, Petition at D1-16.

On March 30, 1993, the Ninth Circuit issued its opinion affirming the Judgment of Dismissal. See, *Mission Oaks Mobile*

Home Park v. City of Hollister, 989 F.2d 359 (9th Cir. 1993); see also, Slip Opinion, Petition at A1-12.

On August 13, 1993, the Ninth Circuit issued an unpublished Order denying Mission Oaks' Petition for Rehearing and rejecting the Suggestion for a Rehearing En Banc. See, Petition at B1-2.

JURISDICTION

The Ninth Circuit decision was filed March 30, 1993. On or about April 13, 1993 Mission Oaks filed a Petition for Rehearing. On August 13, 1993 the Ninth Circuit denied the Petition for Rehearing. Mission Oaks' Petition for Certiorari was docketed with the United States Supreme Court on November 12, 1993. The jurisdiction of the United States Supreme Court was invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 42, United States Code, Section 1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The California Constitution, Article I, Section 7, provides in pertinent part:

> A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . .

The California Constitution, Article I, Section 19, provides in pertinent part:

> Private property may be taken or damaged for public use only when just compensation, . . . has first been paid to, or into court for, the owner.

The California Mobilehome Residence Law (Cal. Civ. Code, Section 798 et seq.) governs many aspects of the relationship between a mobilehome park owner and a mobilehome owner residing on a rented space in a mobilehome park. Civil Code, Section 798.55(a) contains legislative justification for the unique protections provided mobilehome owners. Protections include restrictions on terminating a space tenancy (e.g., Civil Code, Sections 798.55(b), 798.56) and restrictions preventing a park owner from interfering with or preventing a homeowner from selling his home to a new purchaser as long as the prospective homeowner has the financial ability to pay the space rent and does not have a prior history indicating that he or she will not comply with the rules and regulations of the park. (E.g., Civil Code, Section 798.74).

California Government Code Section 50,075 et seq. authorizes California cities to impose "special taxes" if they are approved by a two-thirds vote of the electorate. See, Government Code, Section 50,077. However, pursuant to Government Code, Section 50,076, a "special tax" does not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes.

California Government Code, Section 65,300 et seq. requires that each city must adopt a comprehensive long term general plan for the physical development of the City. Among the items which must be included in the general plan is a housing element. Government Code, Section 65,580 et seq.

In May 1989, the City of Hollister enacted Ordinance No. 728 establishing mobilehome park space rent stabilization. The Ordinance permits a park owner to automatically increase space rent annually by 80% of the CPI increase or 8% whichever is less. Ordinance, Sec. 13B-5. In addition, the park owner has the

opportunity to seek additional rent increases in order to ensure that he receives a "just and reasonable return." Ordinance, Sec. 13B(1)(F); see e.g., Sec. 13B-30 (Adjustments to Net Operating Income NOI).

STATEMENT OF THE CASE

A. Background.

The City of Hollister ("City") is the County seat of rural San Benito County located approximately 50 miles south of the City of San Jose in the State of California. City has a population of approximately 19,000 of which approximately 400 reside in the mobilehome parks located within its boundaries. Mission Oaks is by far the largest park with 235 spaces.

In February 1988, the homeowners at Mission Oaks, dissatisfied with recent space rent increases asked the City to intervene and establish some type of rent stabilization. After several months investigating various alternatives (including long term leases) on May 1, 1989, the City Council adopted Ordinance No. 728 ("Ordinance") in order to "produce stability in rent increases for mobilehome park tenants while recognizing the rights of mobilehome park owners to receive a just and reasonable return on their property." Ordinance, Section 13B-1F.[1]

Ordinance Section 13B-5 permits a park owner to automatically increase his space rent annually by 80% of the CPI increase, or 8% whichever is less. It also permits the park owner to apply to the Rent Commission to further increase rents if necessary to assure that his annual Net Operating Income increases by at least 40% of the CPI increase rate. Ordinance, Section 13B-30.

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[1]The Ordinance exempts parks where there is no space rent (e.g., homeowner owned parks) and parks with 20 or fewer spaces. Ordinance, Section 13B-9A. Since the other parks have 16 or fewer spaces, Mission Oaks is the only park subject to the Ordinance.

B. Procedural History.

1. The Initial State Court Case.

On September 28, 1990, Mission Oaks filed a Complaint in the state court challenging the constitutionality and legality of Ordinance 728. *Mission Oaks Mobile Home Park v. City of Hollister, et al.*, San Benito Superior Ct. No. 17362. In addition to alleging the Ordinance violated Article I, Sections 7 and 19 of the California Constitution, the Complaint alleged violations of the Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. Section 1983 and sought attorneys fees pursuant to 42 U.S.C. Section 1988. The challenges to the Ordinance included: (1) inverse condemnation on the grounds that the Ordinance has no rational basis and is confiscatory; (2) denial of due process because the Ordinance was allegedly enacted in the absence of facts required for such enactment, has no rational basis, and fails to provide procedural due process; (3) violation of equal protection because the Ordinance fails to regulate other parks in the City; (4) preemption by the State Mobilehome Residency Law because the Ordinance purports to add requirements to a notice of termination; (5) allegations that the registration fee is an unconstitutional special tax; (6) allegations that the Ordinance violates 42 U.S.C. Section 1983 (federal taking, due process and equal protection); and (7) allegations that the Ordinance is invalid because the City's General Plan fails to meet statutory requirements. For relief, Mission Oaks sought injunctive, declaratory relief, and $1,000,000 in damages, attorney fees and costs.

On January 24, 1991, City answered denying the major allegations and raising various affirmative defenses. Following substantial discovery, in July 1991, Mission Oaks moved for Summary Judgment.

On October 1, 1991 during the hearing on Mission Oaks' Motion, but prior to a Court ruling, Mission Oaks filed a document entitled "Reservation to Litigate Federal Claims in the United States District Court" purporting to reserve its rights to raise and litigate its federal claims in the United States District Court pursuant to *England v. Louisiana State Board of Medical*

Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). See, "Reservation," Petition at C1-2.[2]

On October 22, 1991 the Superior Court denied Mission Oaks' Summary Judgment Motion, City's Cross-Motion for Judgment on the Pleadings and City's Motion to strike the purported "Reservation." The Superior Court did not rule on the legal effect of the "Reservation."

Following additional proceedings, in April 1992 City moved to stay the proceedings (trial had been set for May 13, 1992) pending an appellate ruling in a pending state writ proceeding (discussed infra) which City contended would dispose of the bulk of Mission Oaks' claims. On May 7, 1992, the parties entered into a Stipulation to stay this State Court matter pending appellate court rulings on the state writ and federal court matters. See, Stipulation and Order, Petition E1-4.

2. The State Court Writ Proceeding.

In January 1991, Mission Oaks filed a Petition with the City Rent Commission contending that the 80% CPI permissive space rent increase was insufficient and seeking a monthly rent increase of $59 per month. Following hearings in April and May 1991 the Rent Commission granted Mission Oaks a monthly space rent increase of $15.86 plus an additional increase of $3.82 per month for 36 months.

On July 12, 1991, Mission Oaks filed a Petition for Writ of Mandate in state court challenging the rent increase. *Mission Oaks Mobile Home Park v. City of Hollister, et al.*, San Benito Superior Court No. 18223.[3] On December 20, 1991 the Superior

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[2]On or about October 16, 1991, Mission Oaks filed an "Amended Reservation" describing in more detail the federal claims it desired to "reserve."

[3]The "Residents of the Mission Oaks Mobilehome Park" were also named as real parties-in-interest. The Mission Oaks Homeowners Association answered on the residents' behalf and participated throughout the Writ proceeding. Although not named in No. 17362, the Mission Oaks Homeowners Association also participated in that proceeding.

Court denied the Writ finding substantial evidence supported the Commission's decision. Mission Oaks appealed and the State Court of Appeal affirmed in an unpublished decision. *Mission Oaks Mobile Home Park v. City of Hollister*, Cal. Ct. of App. 6th Dist. No. H009622 (Slip Op., June 7, 1993). The California Supreme Court denied Mission Oaks' Petition for Review in an unpublished order. *Mission Oaks Mobile Home Park v. City of Hollister*, Cal. Supreme Ct., No. S033928 (September 1, 1993).[4]

3. This Federal Action.

On October 30, 1991, Mission Oaks filed suit in federal court challenging the Ordinance on essentially the same grounds that it had previously advanced in the state court actions.[5]

The City moved to dismiss on grounds of abstention pointing out that the identical issues were being litigated by the same parties in two prior filed and pending state proceedings. On

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[4]Interestingly Mission Oaks did not attempt to file any *England* "Reservation" in this Writ proceeding. To the contrary, it specifically raised and argued claims that the Commission ruling denied it a "fair return" relying in part on federal law and cases. E.g., *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951 (9th Cir. 1991) and *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

[5]The federal suit included all nine claims set forth in state Court No. 17362 (e.g., inverse condemnation (state — first cause of action; federal — fourth claim); due process (state — second cause of action; federal — second claim); equal protection (state — third cause of action; federal — third claim); preemption (state — fourth cause of action; federal — sixth claim); unconstitutional special tax (state — fifth cause of action; federal — seventh claim); violation of 42 U.S.C. Section 1983 (state — sixth cause of action; federal — fifth claim); preliminary and permanent injunction relief (state — seventh cause of action; federal — eighth claim); declaratory relief (state — eighth cause of action; federal — ninth claim); general plan invalidity (state — ninth cause of action; federal — tenth claim). In addition, the federal action included as its first claim Mission Oaks' claim that the action of the Rent Commission (the subject of the state writ proceeding No. 18223) was a violation of Procedural Due Process.

March 30, 1992, the District Court (Hon. James Ware, United States District Judge) issued its opinion dismissing the complaint on *Younger* [*Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)] abstention grounds. See, *Mission Oaks Mobile Home Park v. City of Hollister, supra*, 788 F.Supp. 1117; Petition at D1-16. The Ninth Circuit affirmed (*Mission Oaks Mobile Home Park v. City of Hollister, supra*, 989 F.2d 359, Petition at A1-12) and also denied Mission Oaks' Petition for Rehearing and Suggestion for Rehearing En Banc. Petition at B1-2.

WHY THIS WRIT SHOULD BE DENIED

Mission Oaks apparently bases its argument for granting a Writ of Certiorari on Supreme Court Rule 10.1(a) and (c) contending that the Ninth Circuit decision conflicts with several other Circuit rulings. In fact the Ninth Circuit decision is consistent with this Court's prior rulings and the other Circuit rulings are either clearly distinguishable or based upon erroneous reasoning.

I

THE NINTH CIRCUIT'S DECISION FULLY CONSIDERED AND CORRECTLY DECIDED THE ABSTENTION ISSUE

A. This Case Meets The Criteria For Younger Abstention Set Forth In This Court's Decisions.

In *Younger v. Harris*, 401 U.S. 37, 41, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), this Court held that a federal suit seeking to enjoin[6] state criminal proceedings would violate "the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances."

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[6]In an accompanying footnote, this Court held that in such circumstances declaratory relief is also improper. 401 U.S. at 41n.2. See also, *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971).

Over the past two decades this Court has extended *Younger* to also prevent federal court interference with pending state civil cases. See, e.g., *Huffman v. Pursue Ltd.*, 420 U.S. 592, 604, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975) (State nuisance action which was described as being "in aid of and closely related to" a criminal proceeding); *Juidice v. Vail*, 430 U.S. 327, 334, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977) (Civil contempt for failure to appear for state court deposition emphasizing a state's interest in its contempt process); *Trainor v. Hernandez*, 431 U.S. 434, 444, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977) (Civil action to return fraudulently obtained welfare payments indicating "the principles of *Younger* and *Huffman* are broad enough to apply to interference by a federal court with an ongoing civil enforcement action"); *Moore v. Sims*, 442 U.S. 415, 435, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979) (State proceeding concerning the custody of abused children, emphasizing the compelling state interest in removing the victims of child abuse from their parents).

The importance of the state interest in its proceeding was further stressed in *Middlesex County Ethics Committee v. Garden State Bar Ass'n.*, 457 U.S. 423, 431-32, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982), when this Court applied *Younger* to bar a federal court injunction against a pending state proceeding to discipline an attorney and stated:

> [w]here vital state interests are involved a federal court should abstain 'unless state law clearly bars the interposition of the constitutional claims' . . . '[T]he . . . pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims.

This Court then set forth a three pronged test:

> first, do [the] state [proceedings] . . . constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges.[7] 457 U.S. at 432.

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[7]See also, *Moses H. Cone Memorial Hospital v. Mecury Construction Corp.*, 460 U.S. 1, 26, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (This

In *Ohio Civil Rights Comm' v. Dayton Christian Schools Inc.*, 477 U.S. 619, 627, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986), this Court applied *Younger* to state administrative proceedings charging Dayton with sex discrimination holding *Younger* applies

> "to state administrative proceedings in which important state interests are vindicated, so long as in the course of the proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claims."[8]

This Court also noted that the state administrative proceedings "began before any substantial advancement in the federal action and involve an important state interest." 477 U.S. at 627n.2.

In *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987), *Younger* was further extended to civil disputes between two private parties. Pennzoil sued Texaco in the state courts for alleged interference with a contract to purchase Getty Oil Co. After Pennzoil received a jury verdict, but before Judgment was entered, Texaco filed a civil rights suit in federal district court seeking to enjoin the Judgment.

This Court reversed a federal court injunction, pointing out that *Younger* applied "not only when the pending state proceeding are criminal, but also when certain civil proceedings are pending, if the State's interest in the proceeding are so important that exercise of the federal judicial power would disregard the comity

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Court indicated that the adequacy of the state court proceeding to protect the federal plaintiff rights was also an important factor under a *Colorado River* [*Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-818, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)] abstention analysis).

[8]This Court pointed out that even if the constitutional claims could not be raised directly in the administrative action it would be sufficient if "constitutional claims may be raised in state-court judicial review of the administrative proceeding." 477 U.S. at 629.

between the States and the National Government." 481 U.S. at 11.[9]

In *Pennzoil*, this Court also pointed out that abstention may avoid unwarranted determination of federal constitutional questions because the state courts may resolve the issue on state statutory or constitutional grounds.[10] 481 U.S. at 11-12. After reemphasizing the importance of the state interest in enforcing its judgments (481 U.S. at 13-14) this Court held that Texaco had not met the burden of showing the inadequacies of the Texas state court procedural protection. 481 U.S. at 14-15.

In *New Orleans Public Service Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989), this Court further explained when *Younger* abstention is appropriate. The case involved a city utility rate order which was allegedly preempted by federal law. This Court pointed out that *Younger* applies even if there is a federal preemption claim (491 U.S. at 365), that the state clearly had a substantial interest in the pending proceedings (*Ibid*) and that there was no showing that the City's rate order was "flagrantly" unlawful. 491 U.S. at 367. However, it explained that *Younger* did not extend to proceedings not "judicial in nature" (491 U.S. at 370), and found the rate making proceeding to be "legislative" rather than "judicial" and therefore not the type of proceeding to which *Younger* applies (because there was no interference with an ongoing judicial proceeding).[11] 491 U.S. at 372.

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[9]While relying on *Younger*, this Court pointed out "[t]he various types of abstention are not rigid pigeon holes into which federal courts must try to fit cases." 481 U.S. at 11n.9.

[10]The Court recognized that this consideration is very similar to that raised in *Pullman* [*Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941)] abstention cases. See, 481 U.S. at 11n.9.

[11]See also, *Ankerbrandt v. Richards*, 504 U.S. ____, 112 S.Ct. 2206, 119 L.Ed.2d 468, 485 (1992), this Court reaffirmed in a child abuse case that *Younger* abstention was inapplicable "when no state proceeding was pending nor any assertion of important state interests made."

Applying the criteria set forth in this Court's *Younger* decisions, it is apparent that the Ninth Circuit correctly affirmed the District Court's abstention:

1. There is no question that the state court proceedings here were both "judicial" and "ongoing" at the time of the abstention.

2. Both state court actions were filed *prior* to this federal action. The state Complaint in No. 17362 was filed in September 1990 and the state Writ proceeding in No. 18223 was filed in July 1991. This federal action was not filed until October 1991.

3. At the time the abstention decision was made (March 30, 1992), there has been no activity in the federal action other than the filing of the Complaint and the Motion to Dismiss. In contrast by that time in state No. 17362, the Court had already ruled on various motions including Summary Judgment and Judgment on the Pleadings, substantial discovery had occurred and the case had been set for a May 1992 trial. Meanwhile, in state No. 18223 the Court had held a hearing on Mission Oaks' Writ Petition, denied the Writ, and Mission Oaks had already appealed the result to the state intermediate appellate court.

4. Several of the claims in the federal suit were based on alleged violations of state laws (e.g., Sixth Claim — preemption by State Mobilehome Residency Law, California Civil Code Sections 798 et seq.; Seventh Claim — "special tax" under California Government Code Section 50,077; Tenth Claim — General Plan under California Government Code Sections 65,300 et seq.). Clearly these issues might be mooted by the state court's determination of pertinent state law.

5. The State of California clearly believes that mobilehome park regulation is important. See, Cal. Civ. Code Sections 798 et seq. (Mobilehome Residency Law); see also, *Yee v. City of Escondido*, 503 U.S. ____, 112 S.Ct. 1522, 118 L.Ed.2d 153, 163 (1992) (This Court pointed out California's legislature had recognized the need

of mobile home owners for "unique protection from actual or constructive eviction").

Mobilehome space rent control is manifestly an important issue in California. See, e.g., *Hirsch & Hirsch*, "Legal Economic Analysis of Rent Controls in a Mobilehome Context: Placement Values and Vacancy Decontrol," 35 U.C.L.A. L. Rev. 399, 407-411 (1988), indicating mobilehome rent control exists in over 75 California jurisdictions.[12]

In contrast, there is no specific federal statutory law governing mobilehome parks and mobilehome space rent control. While federal courts have been involved in several cases challenging the validity of local mobilehome rent control ordinances (see e.g., *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988)), there is no question that the bulk of the cases have been brought in the state courts and therefore the state courts may have developed more expertise in dealing with these issues. See, e.g., *Yee v. City of Escondido*, *supra*, (affirming state court mobilehome rent control decision and disapproving *Hall*, *supra*); see also, *Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988) (Upholding state court rent control ruling).

6. There is little question that the state court proceedings provide Mission Oaks with an adequate opportunity to raise the federal issues. In fact, Mission Oaks itself chose to raise all[13] the federal issues in its original state court action and

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[12] A more recent listing *The GSMOL Mobilehome Rent Stabilization Ordinance Handbook*, (Golden State Mobilehome Owners League, Inc. 1st Ed. 1993), Appendix B, identifies some 92 local jurisdictions in California with mobilehome rent control.

[13] Mission Oaks' contention (Petition at 5) that it was forced to raise its takings claim in state court pursuant to the ripeness requirements of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), fails to adequately explain why it also initially filed its federal due process and equal protection claims in state court.

writ proceeding. Mission Oaks' purported reliance on *Sierra Lake Reserve v. City of Rocklin*, 939 F.2d 951, 955 (9th Cir. 1991), to establish the inadequacy of the state court procedures, fails to emphasize that this Court vacated that decision in light of *Yee v. City of Escondido, supra.* See, *City of Rocklin v. Sierra Lake Reserve*, 503 U.S.____, 113 S.Ct. 31, 121 L.Ed.2d 4 (1992).[14]

Here where all the relevant factors[15] support abstention, it is clear that the Ninth Circuit was correct in ordering abstention.

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[14]On remand, the Ninth Circuit admitted that in fact the "[t]wo recent state court opinions [that] refused to follow our decision in Hall . . . have proved prescient." *Sierra Lake Reserve v. City of Rocklin*, 987 F.2d 662, 663 (9th Cir. 1993).

[15]Other factors which have been utilized by this Court under other abstention doctrines also support the decision to abstain. For example, it could also be argued that since both Mission Oaks and City are located in Hollister the federal forum in San Jose is more "inconvenient." See, *Colorado River Water Conservation Dist. v. United States, supra*, 424 U.S. at 819 (Inconvenience of federal forum is a factor in abstention under that analysis). Similarly abstention in favor of the state courts will prevent piecemeal litigation, duplicative adjudication and promote wise judicial administration. See, *Colorado River, supra*, 424 U.S. at 819 (Avoidance of piecemeal litigation is also a relevant factor). To the extent this case seeks declaratory relief (see ninth claim) where there is a pending adequate state court proceeding and/or would be disruptive of state efforts to establish a coherent policy with respect to matters of substantial public concern (e.g., "fair return"), abstention is also required under *Brillhard v. Excess Ins. Co.*, 316 U.S. 491, 495, 62 S.Ct. 1173, 86 L.Ed. 620 (1942), and *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). Finally, as the District Court pointed out (see, 788 F.Supp. at 1122, Petition at D14), *Younger abstention* is appropriate in cases where state court plaintiffs are attempting to "shield themselves" from state court enforcement efforts or are anticipating adverse state court rulings. See also, *American Int'l Underwriters, Inc. v. Continental Ins. Co.*, 843 F.2d 1253, 1259 (9th Cir. 1988) ("forum shopping may be considered as *one* of the relevant factors in deciding whether to abstain under *Colorado River*).

B. The Ninth Circuit's Ruling Is In Accord With Its Prior Rulings — Any Contrary Circuit Rulings Are Distinguishable.

In a valiant attempt to create the appearance of a conflict among the Circuits, Mission Oaks contends that several Circuits have refused to apply *Younger* to cases where the federal plaintiff also initiated the state proceedings. Petition at 13-16.

Initially it should be pointed out that Mission Oaks never raised this issue before the Ninth Circuit and therefore it is respectfully submitted this Court should not entertain it. See, e.g., *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147n.2, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362, 101 S.Ct. 1146, 67 L.Ed.2d 287 (1981). Cf., *Yee v. City of Escondido, supra*, 118 L.Ed.2d at 168-170 (This Court refused to consider a due process challenge because it was not raised or addressed below but did consider a regulatory taking challenge stating it was not a separate claim but merely a separate argument relating to taking).

While this Court may not yet have explicitly applied *Younger* abstention to a case where the prior pending state action was also initiated by the federal plaintiff, it has applied abstention in similar circumstances. For example, in *Growe v. Emison*, 507 U.S. ____, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1992), this Court reviewed the propriety of a federal district court pursuing reapportionment of state legislative and federal congressional districts in the face of prior filed state court litigation seeking similar relief.[16] Albeit without specifically citing *Younger* (see, 122 L.Ed.2d at 399) this Court ruled that the federal court had erred in not deferring to the state court's plan. See, 122 L.Ed.2d at 401.

In any event, the Ninth Circuit has interpreted *Younger* to apply where the prior state action was also initiated by the federal plaintiff. See, e.g., *Fresh International Corp. v. Agricultural Labor Relations Board*, 805 F.2d 1353, 1355 and 1360n.8 (9th Cir. 1986) (Court applied *Younger* abstention in case where the

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[16]Although the federal suit was originally filed by a separate group of plaintiffs, the original state plaintiffs intervened. See, 122 L.Ed.2d at 396-97.

federal plaintiff had initiated state court review prior to filing the federal action).

Beltran v. State of California, 871 F.2d 777 (9th Cir. 1988), is even clearer. There the federal plaintiffs first filed a declaratory action in state court alleging that a state statute was unconstitutional (871 F.2d at 779) and then "[i]n the midst of the state proceedings" filed a second declaratory judgment action in federal court. *Id.* at 781. On these facts, the Court, after noting the state proceedings were "ongoing" at the time the federal complaint was filed, ruled the trial court erred when it failed to abstain on *Younger* grounds.

In contrast to these Ninth Circuit cases, the bulk of the cases relied upon by Mission Oaks (Petition at 14-15) involved situations where *Younger* abstention was clearly inapplicable and therefore any statements concerning its inapplicability to prior state suits brought by the federal plaintiff were dicta.

In *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255 (1st Cir. 1987), *cert denied*, 486 U.S. 1044, 108 S.Ct. 2037, 100 L.Ed.2d 621 (1988), the federal plaintiff never initiated a state court action (see, 829 F.2d at 259) and therefore there was no ongoing state action to which *Younger* could apply. In *Kentucky West Virginia Gas Co. v. Penn. Public Util. Comm'n*, 791 F.2d 1111 (3rd Cir. 1986), the primary issue was whether the Natural Gas Act (15 U.S.C. Section 717 et seq.) or the Natural Gas Policy Act of 1978 (15 U.S.C. Section 3301 et seq.) preempted the local state law. In that context the state's interest was overwhelmed by the federal interest in regulating interstate natural gas rates. 791 F.2d 1116. In *Crawley v. Hamilton County Commissioner*, 744 F.2d 28 (6th Cir. 1984), while there had been a prior state court case it had been inactive for almost a year when the federal suit was filed, therefore again there was no "ongoing" state suit. See, 744 F.2d at 31.

In *Hinrichs v. Whitburn*, 975 F.2d 1329 (7th Cir. 1992), the central issue (see, 975 F.2d 1333) was whether the federal plaintiff had exhausted her state administrative remedies, and the case was dismissed on ripeness grounds. The Court denied abstention because "no prosecution had been initiated against plain-

tiff." *Ibid.*[17] To the extent this language indicates that *Younger* only applies to a criminal proceeding it is clearly wrong.

In summary, it is clear that Mission Oaks is precisely the type of case to which *Younger* abstention should apply. Abstention here is totally consistent with the notion of "comity," "Our Federalism," and "avoid[s] a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted." *Younger v. Harris, supra*, 401 U.S. at 44.

II

THE NINTH CIRCUIT DECISION FULLY CONSIDERED AND CORRECTLY DECIDED THE EFFECT OF THE PURPORTED STATE COURT RESERVATION

A. The State Court "Reservation" Did Not Meet The Criteria Set Forth In This Court's Decisions.

In *Railroad Comm'n of Texas v. Pullman Co., supra*, 312 U.S. 496, this Court held that a federal district court should refrain from deciding a case in which a state action is challenged in federal court as contrary to the federal constitution if there are unsettled questions of state law that may be dispositive of the case and therefore avoid the need for the federal court deciding the federal constitutional question. This abstention doctrine became known as "*Pullman* abstention."

One potential problem with "*Pullman* abstention" is that a plaintiff who wants a federal district court to decide his federal

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[17]The *Hinrichs* Court indicated that in denying abstention it had relied (see, 975 F.2d at 1333) upon language in *Alleghany Corp. v. Haase*, 896 F.2d 1046, 1053 (7th Cir. 1990), *vacated as moot, sub nom., Dillon v. Alleghany*, 499 U.S. 933, 111 S.Ct. 1383, 113 L.Ed.2d 441 (1991). The facts of *Alleghany* are similar to *Kercado-Melendez, supra*, when the insurance commissioners of Wisconsin and Indiana refused to allow it to acquire stock in another insurance company, Alleghany could have chosen to seek review in the state courts but did not do so. See, 896 F.2d at 1049. Under the circumstances, *Younger* was inapplicable because there was no pending state court proceeding.

claims may be compelled under *Pullman* to have these claims first adjudicated in the state court.

In *England v. Louisiana State Board of Medical Examiners, supra*, 375 U.S. at 419-21, this Court addressed the problem by providing that such a plaintiff could with a proper reservation in the *subsequent* state court action preserve his right to have his federal claims adjudicated by the federal court after the state court had made its decision.

From the beginning this Court has limited "*England* reservations" to cases where a *prior* filed federal court action was stayed under a *Pullman* abstention ruling pending the resolution of the *later* filed state action. See, e.g., *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 480n.14, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) (Court applied res judicata effect of state decision to later filed federal action despite plaintiff's notice that he was prepared to pursue federal claims in federal court if his petition was denied); *Allen v. McCurry*, 449 U.S. 90, 101n.17, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980) (Court held decision of state court on federal constitutional claim was res judicata and distinguished *England* by pointing out that it involved a prior federal court abstention); see also, *Montana v. United States*, 440 U.S. 147, 163, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979) (Court indicated the *England* doctrine is limited to cases where there has been a prior federal court abstention and a federal litigant is compelled to seek state court determination of claims).

Clearly under this Court's prior rulings Mission Oaks purported "Reservation" in a prior filed state action does not meet the *England* criteria.

B. The Ninth Circuit Ruling Is In Accord With Its Prior Rulings And The Majority Of Circuits — Any Contrary Circuit Rulings Are Distinguishable.

Both the District Court (788 F.Supp. at 1122-23, Petition at D15-16) and the Ninth Circuit (989 F.2d at 362, Petition at A11) concluded that the state court "Reservation" was inappropriate in the context of *Younger* abstention. Again their decision accords with prior Ninth Circuit decisions. See, e.g., *Beltran v. State of California, supra*, 871 F.2d at 783n.8 ("When *Younger*

abstention applies, federal plaintiffs cannot reserve their federal claims from state court adjudication for later decision by the federal courts").

Most circuits clearly agree with the Ninth Circuit's approach. See, e.g., *Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 311-12 (1st Cir. 1986) (The fact that the defendant in a state court action had continually stated that it was reserving a federal question was of no avail. Court held *England* federal claims reservation is available only "by properly invoking the jurisdiction of the federal court in the first instance"); *Schuster v. Martin*, 861 F.2d 1369, 1373-74 (5th Cir. 1988), *reh'g denied*, 866 F.2d 1417 (5th Cir. 1989) (Court determined that plaintiff's filing of a state court document purporting to reserve all his federal claims under *England* was ineffective in a case "where the plaintiff voluntarily chooses to pursue the state action first"); *Duty Free Shop, Inc. v. Administracion de Terrenos*, 889 F.2d 1181, 1183 (1st Cir. 1989) (*England* state court federal claims reservation is ineffective if the federal court abstention is not on *Pullman* grounds, e.g., *Younger* abstention);[18] *Temple of Lost Sheep Inc. v. Abrams*, 930 F.2d 178, 182-83 (2nd Cir. 1991), *cert denied*, ____ U.S. ____, 112 S.Ct. 193, 116 L.Ed.2d 153 (1991) (In a case where the Court abstains under *Younger* a federal plaintiff may not avoid preclusion by reserving in the state court its federal claims following *Younger* abstention).

The cases relied upon by Mission Oaks (Petition at 21) are distinguishable. In *Bradley v. Pittsburgh Board of Education*, 913 F.2d 1064 (3rd Cir. 1990), a teacher dismissal case, Bradley filed suit in federal court while the local Board was considering the issue and *before* initiating state court proceedings. See, 913 F.2d at 1068. In that context and with the federal suit already on file, Bradley was dismissed by the Board. In order to utilize the administrative procedure provided by state law, Bradley was required to appeal the dismissal to the Secretary of Education. Before the Secretary and later in state court, Bradley expressly

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[18]In *Duty Free Shop* the purported *England* Reservation had been made nine days before the scheduled hearing (see, 889 F.2d at 1182) not on the day of the hearing as here.

reserved under *England* his right to litigate his federal claims in federal court. *Ibid. Bradley* is distinguishable because (1) Bradley first filed in federal court; (2) defendants did not object to Bradley's express reservation; and (3) the Secretary expressly honored the reservation. 913 F.2d at 1072.

In *Barnes v. McDowell*, 848 F.2d 725 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007, 109 S.Ct. 789, 102 L.Ed.2d 780 (1989), the primary issue was whether a prior state judgment foreclosed a later filed federal action. The Court applying Kentucky state law preclusion rules[19] held that because the causes of action in the two suits were not the same the district court erred in granting summary judgment.

The Court discussed abstention only in passing, noting that the District Court had ordered "the federal litigation to be held in abeyance" until the state court proceedings were resolved. 848 F.2d at 728. It discussed the "Reservation" of federal claims only in connection with its discussion of another case (*Wicker v. Board of Educ.*, 826 F.2d 442 (6th Cir. 1987)) where it explained that *after* the federal plaintiff in *Wicker* had *first* filed suit in federal court he had filed suit in state court and after the federal abstention order had filed an *England Reservation* in state court. 848 F.2d at 731. The Court pointed out that it had reversed the dismissal of the *Wicker* suit on res judicata grounds because "it was clear from the record in that case that the state courts never reached the constitutional issue." 848 F.2d at 732.

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[19]In general, Kentucky courts apply the doctrine of issue preclusion or collateral estoppel "only as to matters which were necessarily involved and determined in the former action, and is not conclusive on matters which were immaterial or unessential to the determination of the prior action or which were not necessary to uphold the judgment." 848 F.2d at 730-731.

In contrast, under California law issue preclusion applies not only to those claims actually litigated in a prior proceeding, but also those which *could have been litigated* as part of that cause of action. See, *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 365 (9th Cir. 1993).

Here, of course, the suits were first filed in state court and there is no showing that state courts have not or will not decide the constitutional issues.

C. Mission Oaks' Reliance On The Fields Case Is Misplaced.

In a final attempt to create a cognizable conflict, Mission Oaks argues that its *England* Reservation should nevertheless apply because it was not voluntarily in state court.

Initially, it should be pointed out that in regard to the application of the doctrine of res judicata to involuntary plaintiffs, this Court in *Allen v. McCurry, supra*, stated:

> There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have engaged at all.
>
> 449 U.S. at 104.

See also, *Peduto v. City of North Wildwood*, 878 F.2d 725, 729 (3rd Cir. 1989) (The fact that a federal plaintiff was forced to exhaust state court taking remedies pursuant to *Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), does not mean they were denied due process when the federal court then dismissed their claims based on res judicata); *Palomar Mobilehome Park Ass'n v. City of San Marcos, supra*, 989 F.2d at 365 (Court held that a mobilehome park was barred by res judicata from bringing a federal action when it had received a full and fair adjudication of its constitutional claims in a prior state action).

The case cited by Mission Oaks (Petition at 23-24) as being in conflict with these rulings (*Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992), is clearly distinguishable. In *Fields* the plaintiffs first filed in state court but raised *only* state law issues. See, 953 F.2d at 1302. After the state court proceedings were over, Fields filed in federal court raising federal claims. *Ibid.* The Eleventh Circuit affirmed the District Court's

dismissal because Fields had not adequately preserved his federal claims. In the course of its discussion, the Court pointed out that under Eleventh Circuit law a would be federal litigant may preserve access to a federal forum "despite being unable to rely on *England*" (953 F.2d at 1305) by making a formal reservation in the state court of their intent to bring their federal claims in federal court. *Ibid.* The Court indicated that such a reservation is effective only if (1) the litigant was precluded from filing his or her suit in federal court in the first instance; and (2) the litigant is in state court "involuntarily." *Id.* at 1306.

Here, while Mission Oaks may have been forced by the operation of *Williamson County* to file its "taking" claim in state court, nothing required it to do so with all its due process and equal protection claims. In fact is clear that the Mission Oaks voluntarily first chose the state court to bring all its claims and changed its mind only after *Sierra Lake* was decided and it perceived it would be more successful in federal court. This is not the type of decision which an *England* Reservation is designed to protect.[20] The Circuit Court was therefore clearly correct in its treatment of the purported *England* "Reservation."

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[20]This is especially true here, since as in *Pennzoil Co. v. Texaco Inc., supra* (see Justice Marshall's concurring opinion, 481 U.S. at 23), the "odor of impermissible forum shopping pervades this case."

CONCLUSION

After initially filing its challenges to the Hollister Ordinance in State Court, Mission Oaks changed its mind and apparently believing the federal courts would provide a more favorable forum refiled the same claims in Federal Court. Under the circumstances, this Court should deny Mission Oaks Petition seeking review of the dismissal of its federal claims on abstention grounds because it is clear that these decisions were properly made and this case otherwise fails to warrant review by this Court.[21]

DATED December 1993.

Respectfully submitted,

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[21]In upholding the Commission's rent decision in the state writ proceedings the state court necessarily determined that the Ordinance was valid and did not deprive Mission Oaks of its right to a just and reasonable return. Since a federal court would have to apply res judicata/collateral estoppel principles in accord with applicable state law (see, e.g., *Allen v. McCurry, supra*, 449 U.S. at 95-96), many, if not all, of Mission Oaks' claims would be barred.